U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-I-

DATE: JAN. 10, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an investment management company, seeks to employ the Beneficiary as a senior software engineer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based "EB-2" immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition. The Director found that the minimum requirements of the labor certification allowed a beneficiary to qualify for the job offered with less than an advanced degree, and therefore did not support the requested classification of advanced degree professional.

On appeal the Petitioner asserts that the minimum requirements of the labor certification are consistent with the petition's classification request of advanced degree professional.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

A. Employment-Based Immigrant Petition Process

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of U.S. workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

B. Advanced Degree Professional Classification

A petition for an advanced degree professional must generally be accompanied by a valid, individual labor certification. 8 C.F.R. § 204.5(k)(4)(1). The regulations state that to be eligible for the requested classification, the job offer portion of the labor certification must demonstrate that the job requires a professional holding an advanced degree or the equivalent. 8 C.F.R. § 204.5(k)(4)(i). The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> [a]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree

If the labor certification allows for less than an advanced degree, the position will not qualify for advanced degree professional classification.

II. ANALYSIS

In determining whether the position offered qualifies for advanced degree professional classification, we look to the terms of the labor certification. The education, training, experience, and other requirements for the proffered position are set forth at Part H of the labor certification. In this case Part H states that the proffered position has the following minimum requirements to qualify for the job of senior software engineer:

4.	Education: Minimum level required:	Master's degree
4-B.	Major Field of Study:	Computer Science/ Computer Engineering
5.	Is training required in the job opportunity?	No
6.	Is experience in the job offered required?	Yes
6-A.	How long?	24 months
7.	Is an alternate field of study acceptable?	No
8.	Is an alternate combination of education and experience acceptable?	No
9.	Is a foreign educational equivalent acceptable?	Yes
10.	Is experience in an alternate occupation acceptable?	Yes
10-A.	How long?	24 months
10-B.	Job titles of alternate occupations	Software Engineer/ Systems Engineer

At section H, box 14, of the labor certification the following additional language is provided regarding the "Specific skills and other requirements" for the job:

> Two years of experience [in] software development using AngularJS and SSP.Net and using best practices with continuous integration. In-depth knowledge in project management with software design lifecycle.
>
> WILL ACCEPT ANY OTHER SUITABLE COMBINATION OF EDUCATION, TRAINING, OR EXPERIENCE IN LIEU OF H4 THROUGH H10.

In order to determine what a job opportunity requires, we must examine "the language of the labor certification job requirements." *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS must examine the certified job offer exactly as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). Our interpretation of the job's requirements must involve reading and applying the plain language of the alien employment certification application form. *Id.* at 834. Moreover, we read the labor certification as a whole to determine its requirements. "The Form ETA 9089 is a legal document and as such the document must be considered in its entirety." *Matter of Symbioun Techs., Inc.*, 2010-PER-10422, 2011 WL 5126284 (BALCA Oct. 24, 2011) (finding that a "comprehensive reading of all of Section H" of the labor certification clarified an employer's minimum job requirements).[1]

In his decision the Director found that the labor certification did not support the requested classification of advanced degree professional because of the language in section H, box 14, that the employer would accept any suitable combination of education, training, or experience in lieu of the education and experience requirements specifically stated in boxes H.4 through H.10 the labor certification. The Director interpreted the language in H.14 as indicating that the Petitioner would accept some combination of education, training, or experience that was less than an advanced degree as defined in 8 C.F.R. § 204.5(k)(2).

On appeal the Petitioner asserts that the Director's decision was incorrect because the use of the word "suitable" before "combination of education, training, or experience" in H.14 of the labor certification accorded with "Kellogg language" requirements and meant that the Petitioner would not accept anything less than the job opportunity requirements specified in the boxes from H.4 to H.10 of the labor certification, which include a master's degree or a foreign educational equivalent and thus support the requested classification of advanced degree professional. The statement that an employer will accept applicants with "any suitable combination of education, training or experience" is commonly referred to as *Kellogg* language, originating in a case before the Board of Alien Labor Certification Appeals, *Matter of Francis Kellogg*, 1994-INA-465 and 544, 1995, INA 68 (Feb. 2, 1998) (*en banc*). The language was later incorporated into the regulation at 20 C.F.R. § 656.17(h)(4)(ii), which states that if a beneficiary is already employed by a petitioner, does not meet the primary job requirements, and potentially qualifies for the job only under the employer's alternative requirements, the labor

[1] Although we are not bound by decisions issued by the Board of Alien Labor Certification Appeals, we may nevertheless take note of the reasoning in such decisions when considering issues that arise in the employment-based immigrant visa process.

certification must state "that any suitable combination of education, training, or experience is acceptable."

We do not generally read the inclusion of *Kellogg* language in a labor certification as altering the stated minimum requirements. When a petitioner goes beyond the *Kellogg* language, however, we must evaluate the effect of that additional language. In this case the Petitioner contends that the word "suitable" in its *Kellogg* language context and as incorporated in box H.14 of the labor certification means that any other combination of education, training, or experience must be at least equal to the stated requirements in boxes H.4 to H.10 of the labor certification. In support of this contention the Petitioner has submitted a letter from an English professor at who asserts that a combination of alternative requirements would not be "suitable" if they amount to less than the standard requirements. analysis is incomplete, however, because it focuses exclusively on the word "suitable" and does not address how the addition of the words "in lieu of" affects the meaning of the standard *Kellogg* language. Advisory opinions statements submitted as expert testimony may be utilized by USCIS at its discretion. Where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept it or may give it less weight. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Thus, both the Petitioner in the appeal brief and in his expert opinion letter neglect to address the addition of the words "in lieu of H.4 through H.10" to the standard *Kellogg* language. *Kellogg* language alone, as discussed above, indicates a petitioner's equal acceptance of candidates meeting either the primary or the alternate requirements defined on the labor certification in boxes H.4 through H.10. In stating that it would accept any suitable combination of education, training, or experience "in lieu of" the otherwise defined primary and alternate requirements, the Petitioner no longer restricts acceptable combinations to those spelled out in boxes H.4 through H.10. Rather the Petitioner goes beyond the *Kellogg* language and indicates that a combination of education, training, and experience that does not necessarily accord with the minimum requirements in boxes H.4 to H.10 could also be acceptable. Although the Petitioner now asserts that the term "suitable" restricts the acceptable combinations to those requiring a minimum of a bachelor's degree followed by five years of experience or a master's degree, the language of the labor certification does not support this assertion. In sum, the statement in box H.14 of the labor certification creates a different minimum requirement that allows for a combination of education, training and/or experience that could be less than a single master's degree or a single bachelor's degree plus five years of progressive experience.

Neither the Act nor USCIS regulations allow a position to be classified as an advanced degree professional position if the minimum educational requirement can be met with anything other than a single academic degree. Since the minimum requirements of the labor certification in this case can be satisfied with less than a single U.S. master's degree or foreign equivalent degree, and with less than a single U.S. bachelor's degree or foreign equivalent degree followed by five years of progressive experience, the labor certification does not support the requested classification of advanced degree professional under section 203(b)(2) of the Act. The Petitioner's allowance of a suitable combination of education, training or experience "in lieu of" the otherwise stated

requirements, without defining what a suitable combination of education, training or experience would be, prohibits us from finding that the labor certification supports a request for advanced degree professional classification.

III. CONCLUSION

The labor certification does not support the requested classification of advanced degree professional because it does not require at least a master's degree or foreign equivalent degree, or a bachelor's degree or foreign equivalent degree followed by five years of qualifying experience, to meet the minimum educational requirement for the job.

ORDER: The appeal is dismissed.

Cite as *Matter of P-I-*, ID# 2525081 (AAO Jan. 10, 2019)